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Mr. Dimitriou summarized the main themes of his paper, *The Individual Practitioner and Commercialism in the Profession: How Can the Individual Survive?*. He commented, first, that boosting profits seems to have become the dominant motive in the profession, with clients being relegated to the status of a means to the end of lawyer financial well-being, and second, that ethical rules are being subverted by lawyers when it is to their economic advantage, even if not to their client's advantage. Mr. Dimitriou then restated his thesis: Lawyers must refocus on client needs and desires. Thus, his presentation began by highlighting the essence of the tension between commercialism and professionalism, a theme that ran throughout the discussion and which was again highlighted in Professor Gillers's concluding remarks with his recommendation that the participants read Justice O'Connor's dissent in *Shapero v. Kentucky Bar Ass'n*.[1]

Having stated the problem and a general approach, Mr. Dimitriou then proposed a specific solution: value billing. In this paradigm, the lawyer and client jointly focus on the goals of the client and the value to the client of various legal services in attempting to achieve those goals. Value billing is the antithesis of hourly legal fees. Mr. Dimitriou gave the following example to show how value billing might work in a litigation context. In a lawsuit there are twenty witnesses whose depositions might be taken. The lawyer and client discuss them, with the lawyer listing the depositions in the order of importance, stating the cost of each, and expressing a professional judgment about the degree of certainty expected from taking three, four, five, or more of them. The client asks further questions, then decides for how many depositions it is willing to pay. The lawyer takes the depositions, charging the client the agreed fee for each.

Later in the discussion, Mr. Dimitriou gave an estate planning example, with the dialogue resulting in the client picking from a menu of instruments to meet the client's goals within the client's financial parameters. In each example, the value billing paradigm included specific fees set by the lawyer in advance; discussions between the lawyer and client about goals, methods, and expense; and a decision by the client.

The discussion of Mr. Dimitriou's paper and presentation dealt with the problems he had identified, as well as others that concerned the participants, and solutions to those problems. The discussion focused on value billing, but also extensively discussed other possible solutions involving law schools, continuing legal education, judges, and further conferences involving lay persons as well as lawyers.

In addition to the problems of greed, unethical conduct, and client

1. 486 U.S. 466 (1988).

dissatisfaction mentioned by Mr. Dimitriou, participants focused on the rise of professional incivility. There was general agreement from the bench and bar that the practice of law has lost much of its civility during the past fifteen years. This was shown quite clearly by a recent survey undertaken in the Seventh Circuit. A major cause, claimed one large-firm partner, has been the demand of clients that lawyers embrace the "junkyard dog" school of litigation.

One participant mentioned a recent article in the *Georgetown Journal of Legal Ethics* reporting a survey showing shockingly widespread unethical conduct by lawyers. Others opined that there is no dichotomy on issues of civility or ethics between large firms and small firms or sole practitioners, although a judge noted that the Seventh Circuit survey did show a dichotomy in civility between large cities and small communities.

A large part of the discussion centered on whether value billing holds promise as a solution to the issues raised by Mr. Dimitriou. One commenter thought that it is not a solution but merely a "gimmick." Another disagreed, calling it a useful tool if not a comprehensive solution. Mr. Dimitriou responded to the "gimmick" charge, claiming that the real "gimmick" is the hourly fee. Note how misleading it is, he commented, for one lawyer to charge $100 an hour but to take ten hours to do a job, while another charges $400 an hour but only takes a half-hour to provide the same service. The $400-an-hour lawyer is thus cheaper than the $100-an-hour lawyer, but their hourly rates hide this essential fact from the client—at least from the inexperienced, unsophisticated client.

Several participants noted that many of the aspects of value billing, as described by Mr. Dimitriou, seem to be required by current ethical rules that mandate keeping the client informed and giving the client power over the scope of the representation and the expenses to be paid. Others noted that sophisticated corporate clients already seem to be achieving most of the benefits of value billing through their careful management of legal expenses. Still others wondered whether the value billing paradigm would be meaningful to inexperienced, unsophisticated clients. All of these points seemed to raise the issue of whether value billing would do anything that is not already being done.

Mr. Dimitriou, and other participants who saw promise in value billing, responded that value billing is an attempt to extend to many others the benefits insisted on by powerful corporate clients, while directing the financial incentives of lawyers toward rewarding investment and efficiency. One academic commenter doubted that value billing would work for disadvantaged clients, especially those whose legal matters are typically handled on a contingent-fee basis. Although Mr. Dimitriou agreed that value billing is not applicable to all clients and all matters, he stated that the communication and joint decision-making that are key elements of value billing are desirable for clients without experience in dealing with lawyers. Another commenter noted

that the heart of value billing is the attitude of lawyers toward clients and that inexperienced and less sophisticated clients particularly would benefit from a shift in attitudes toward involving the client in the key decisions about the representation. Others questioned whether it is possible to develop the communication and understanding essential for value billing in a one-time attorney-client relationship. The key, it was recognized, is that lawyers must take the time and make the effort to educate the client about the possible legal tools that can be brought to bear in solving the client's problem, the costs of each, and the probable results—an approach, noted one large-firm partner, quite reminiscent of good medical practice.

This debate about the desirability and likelihood of providing the benefits of value billing to clients other than sophisticated corporations spotlighted a difference in opinion about what clients desire from legal representation. The small-firm lawyers all believed that clients do not simply want a narrow legal result, *i.e.*, do not merely want to "win," but that clients want their legal problems to be resolved in a practical sense, and they want some control in that resolution. Mr. Dimitriou cited a survey of clients by the American Bar Association and the American Bar Foundation showing that "[o]f the ten or so factors clients considered most important in measuring their satisfaction with their attorneys, results achieved were not even mentioned, whereas lawyers continue to believ that clients consider the results obtained . . . to be one of the most important [factors]." In response, one large-firm partner asserted that, although clients are no longer concerned with the excellence of the lawyer's work product, their central desire continues to be to win.

Conference participants who acknowledged the desire of clients to understand and be a part of the solution of their legal problems thought that the educational and communication processes of value billing are significant benefits. An additional benefit of value billing is to assist clients in comparing the charges of different lawyers—making pricing more transparent and thus enhancing competition. Similarly, ordinary clients would be able to exercise the same kind of control over costs that sophisticated corporate clients insist on.

Finally, value billing changes the financial incentives of lawyers, rewarding efficiency rather than promoting inefficiency as hourly fees do. A return to this old-fashioned, traditional billing concept would spare clients from unpleasant surprises when a matter takes the lawyer longer than anticipated. The client does not bear that risk; the lawyer does. However, several participants noted how little lawyers know about their costs and about how to price their services on that basis. Both a large-firm lawyer and a professor were concerned that lawyers would simply estimate high to avoid the risk of being wrong. No one mentioned that in a competitive market, with transparent pricing due to value billing, other lawyers are likely to attempt to accurately estimate the costs of various routine services and to set their fees at a competitive rate. This, together with the reward for efficiency that value

billing offers, might result in lower costs generally as well as greater client control.

Several participants were concerned about the malpractice consequences of value billing decisions. If a client elects for his lawyer to do less than is customary to solve a particular problem and the result is poor, might the lawyer be held liable?

Another issue raised by one commenter was whether value billing promotes the abdication of lawyers' professional responsibilities by allowing the client to make choices about the level of lawyer competence for handling a matter. This, in turn, relates to two other concerns: First, in many situations, due to lack of sophistication or judgment, or to emotional involvement, might clients make poorer decisions than lawyers would? Second, might this fuel the trend toward incivility, with clients demanding scorched-earth tactics?

Although the connection between incivility and value billing was not addressed at the conference, a number of participants offered suggestions about how the rise in professional incivility should be combatted. First, it was agreed that judges have a major responsibility, both to set a proper example and to refuse to tolerate professional incivility in their courts. Second, it was suggested that the law schools have a role to play, although there was deep disagreement about what it is. Several participants expressed concern about the breakdown in communication between the academy and the bar, with several practicing lawyers among them complimenting the joint participation in the conference. A judge noted that law professors today are being seen as competitors to practicing lawyers, rather than as "wise counselors and advisers to the profession and the conscience of the profession," and applauded the role of the law school faculty in the conference. Partners of large law firms suggested that law schools should educate lawyers, and the profession train them. One commenter suggested that the competence problem, especially the performance-competence problem identified by Mr. Dimitriou in his paper, must be addressed by post-graduation professional training. Other participants raised the question of whether it is possible to teach ethics or civility, as distinct from teaching the rules as a code. A judge suggested that they must be taught in the context of other material, such as discovery or evidence. Third, a judge warned that the bar and bench must be careful what kinds of conduct are encouraged or condoned in continuing legal education programs.

Finally, it was suggested that all of these problems be addressed by a more extended conference that should include a number of lay persons with different perspectives and training, as well as a broad mix of lawyers, judges, and professors.